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Convention to Combat Desertification

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OUTSTANDING ITEMS

CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES, IN ACCORDANCE WITH ARTICLE 28, PARAGRAPHS 2(a) AND 6 OF THE CONVENTION

CONSIDERATION OF THE ESTABLISHMENT OF AN OPEN-ENDED AD HOC GROUP TO EXAMINE AND MAKE RECOMMENDATIONS ON THE ISSUES OF ARBITRATION AND CONCILIATION PROCEDURES

Note by the secretariat

1. At its second session, the Conference of the Parties, by decision 2/COP.2[1/], decided to include as a selected item on the agenda for its third and, if necessary, fourth session, consideration of annexes containing arbitration and conciliation procedures, in accordance with article 28, paragraphs 2(a) and 6 of the Convention. By decision 22/COP.2, the Conference of the Parties decided also to consider this issue further in the light of the progress of the negotiations on the same issues in other relevant environmental conventions with a view to deciding how to take this matter forward. The Conference further decided to consider at its third session the establishment of an open-ended ad hoc group to examine and make recommendations on the issues of arbitration and conciliation procedures, taking into account the document prepared by the secretariat.

2. The present note containing a draft annex on arbitration and a draft annex on conciliation reproduces the content of document ICCD/COP(2)/10, par two.

1/ For decisions of the Conference of the Parties at its second session, see document ICCD/COP(2)/14/Add.1.

Annex

PROCEDURES FOR CONCILIATION AND ARBITRATION

I. INTRODUCTION

1. In paragraph 5 of its resolution 6/1 entitled "Organization and programme of work for the interim period" (A/50/74, appendix II), adopted at its sixth session, the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification (INCD) requested the Interim Secretariat to prepare draft annexes on conciliation and arbitration for its eighth session. Document A/AC.241/50 was prepared in response to that request, and the present note is based almost entirely on that document.

II. BACKGROUND

2. Article 28 of the Convention provides that, when ratifying, accepting, approving, or acceding to the Convention, or at any time thereafter, a Party other than a regional economic integration organization may declare in a written instrument that, in respect of any dispute concerning the Convention, it recognizes arbitration and/or submission to the International Court of Justice as compulsory means of dispute settlement in relation to any Party accepting the same obligation.

3. Article 28 further provides that, if the Parties to a dispute have not accepted the same or any procedure and if they have not been able to settle their dispute within twelve months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute.

4. Owing to time pressure during the negotiation of the Convention, it was not possible to include annexes on conciliation and arbitration as part of the original text. Hence, paragraphs 2 and 6 of article 28 provide that arbitration and conciliation shall be in accordance with "procedures adopted by the Conference of the Parties in an annex as soon as practicable".

III. TIMING OF ADOPTION OF ANNEXES

5. The Convention does not require the adoption of annexes on conciliation and arbitration at the first session of the Conference of the Parties. It rather provides that such annexes shall be adopted "as soon as practicable".

IV. STATUS OF ANNEXES AND PROCEDURE FOR ADOPTION

6. Consistent with article 29 of the Convention, annexes on arbitration and conciliation will form an integral part of the Convention. Once adopted by the Conference of the Parties in accordance with article 30, they shall enter into force for all Parties to the Convention six months after the date of communication

by the Depositary of their adoption, except for Parties which notify in writing their non-acceptance, in accordance with article 31.

V. THE DRAFT ANNEXES

7. Procedures for arbitration and conciliation to resolve disputes relating to the interpretation or application of conventions abound. The wording and structure of such procedures is, therefore, well established. In preparing the drafts in appendices I and II, it appeared most appropriate to find inspiration in precedents, with the important proviso that procedures must be adapted to the subject-matter in hand. Precedents examined include the Optional Rules for Arbitrating Disputes Between Two States of the Permanent Court of Arbitration, Annex VI of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), procedures pursuant to the Vienna Convention for the Protection of the Ozone Layer (Vienna Convention), as well as Annex II of the Convention on Biological Diversity.

8. In light of the substantive provisions contained in the Convention to Combat Desertification, it would appear that flexible and concise procedures would be best suited to the Convention. Such procedures would let the Parties adapt the procedures to relevant circumstances. In any case, they should not involve cumbersome proceedings for the Parties. Against this background, the draft annexes in appendices I and II are largely modelled on concise procedures such as relevant annexes of the Convention on Biological Diversity and the Basel Convention rather than the longer form of the Rules of the Permanent Court of Arbitration.

9. The drafts are, of course, adapted to take account of the subject-matter and legal characteristics of the Convention to Combat Desertification, including the fact that annexes form an integral part of the Convention. Headings were added for ease of reference.

Appendix I

DRAFT ANNEX ON ARBITRATION

Following is the text of a draft annex on arbitration, which could be adopted as Annex V to the Convention.

ANNEX V

ARBITRATION

Purpose

Article 1

The present Annex provides the procedures for arbitration referred to in article 28 of the Convention.

Notification of disputes

Article 2

1. The claimant Party shall notify the Permanent Secretariat that the Parties are referring a dispute to arbitration pursuant to article 28 of the Convention. The notification shall state the subject-matter of arbitration and include, in particular, the articles of the Convention, the interpretation or application of which are at issue.

2. If the Parties do not agree on the subject-matter of the dispute before the President of the Arbitral Tribunal is designated pursuant to Article 3, the Tribunal shall determine the subject-matter.

3. The Permanent Secretariat shall forward the information thus received to all Parties to the Convention.

Appointment of arbitrators

Article 3

1. In disputes between two parties, a Tribunal shall be established consisting of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the Tribunal. The latter shall not be a national of any of the parties to the dispute, nor have his or her usual place of

residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.

3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Failure to appoint arbitrator or designate President

Article 4

1. If the President of the Tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a Party, designate the President within a further two-month period.

2. If one of the Parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other Party may inform the Secretary-General of the United Nations, who shall make the designation within a further two-month period.

Basis for decisions

Article 5

The Tribunal shall render its decisions in accordance with the provisions of the Convention and international law.

Rules of procedure

Article 6

Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall determine its own rules of procedure.

Interim measures of protection

Article 7

The Tribunal may, at the request of one of the Parties, recommend essential interim measures of protection.

Facilitating work of the Tribunal

Article 8

The parties to the dispute shall facilitate the work of the Arbitral Tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Confidentiality of information

Article 9

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the Tribunal.

Costs of Tribunal

Article 10

1. Unless the Arbitral Tribunal determines otherwise because of the particular circumstances of the case, the costs of the Tribunal shall be borne by the parties to the dispute in equal shares.

2. The Tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Intervention in proceedings

Article 11

Any Party to the Convention that has an interest of a legal nature in the subject-matter of the dispute, which may be affected by the decision in the case, may intervene in the proceedings with the consent of the Tribunal.

Counter-claims

Article 12

The Tribunal may hear and determine counter-claims arising directly out of the subject-matter of the dispute.

Non-appearance of a party

Article 13

If one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. The absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the Tribunal must satisfy itself that the claim is well founded in fact and law.

Majority for decision

Article 14

Decisions both on procedure and substance of the Tribunal shall be taken by a majority vote of its members.

Time limit for final decision

Article 15

The Tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five more months.

Final decision

Article 16

The final decision of the Tribunal shall be confined to the subject-matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the Tribunal may attach a separate or dissenting opinion to the final decision.

Authority of award

Article 17

The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

Controversy on interpretation or implementation

Article 18

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the Tribunal which rendered it.

Italicized headings

Article 19

The italicized headings of the present procedures are for reference purposes only. They shall be disregarded in the interpretation of the procedures.

Appendix II

DRAFT ANNEX ON CONCILIATION

Following is the text of a draft annex on conciliation, which could be adopted as Annex VI to the Convention.

ANNEX VI

CONCILIATION

Purpose

Article 1

The present Annex provides the procedures for conciliation referred to in article 28 of the Convention.

Creation of Conciliation Commission

Article 2

A Conciliation Commission shall be created at the request of any party to a dispute in accordance with the provisions of article 28, paragraph 6 of the Convention.

Composition and appointment of members

Article 3

1. The Conciliation Commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each party concerned and a President chosen jointly by those members.

2. In disputes between more than two parties, parties in the same interest shall appoint their members of the Commission jointly by agreement. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Failure to appoint members within time limit

Article 4

If any appointments by the parties are not made within two months of the date of the request to create a Conciliation Commission, the Secretary-General of the United Nations shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.

Failure to appoint President within time limit

Article 5

If a President of the Conciliation Commission has not been designated within two months of the last of the members of the Commission being appointed, the Secretary-General of the United Nations shall, if asked to do so by a party, designate a President within a further two-month period.

Procedure

Article 6

The Conciliation Commission shall, unless the Parties to the dispute otherwise agree, determine its own procedure.

Decisions on competence

Article 7

A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.

Majority required for decisions

Article 8

Decisions both on procedure and substance of the Conciliation Commission shall be taken by a majority vote of its members.

Proposal for resolution

Article 9

The Conciliation Commission shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.

Italicized headings

Article 10

The italicized headings of the present procedures are for reference purposes only. They shall be disregarded in the interpretation of the procedures.

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